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Supreme Court of the United States

OCTOBER TERM, 1979

JAMES F. SCHAD, 613 CORPORATION and
JULIETTE ANN DI LUCIANO,

Appellants,

v.

BOROUGH OF MOUNT EPHRAIM,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY *AMICI CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union is a non-partisan organization of over 200,000 members, dedicated to defending the fundamental liberties guaranteed in the Bill of Rights; the ACLU of New Jersey is one of its state affiliates. Foremost among those liberties is freedom of speech, and the ACLU has represented literally thousands of individuals to defend freedom of speech against laws, and the arbitrary actions of officials, which limit the flow of information and freedom of self-expression the Amendment was enacted to secure.

The ordinance at issue here substantially abridges First Amendment

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*/ Both parties are forwarding letters consenting to the filing of this brief directly to the Clerk.

rights and affords local officials a broad discretionary power to eliminate activity which the First Amendment protects, all under the guise of "zoning". Because the ordinance, if upheld, would permit a drastic reduction of protection afforded by the First Amendment, amici submit this brief amici curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although the activity for which the Borough of Mt. Ephraim has punished Appellants by a $300.00 fine was live nude dancing, this is not a nude dancing case. As amici view it, the case presents no question regarding the extent of First Amendment protection to which such activity is entitled, or, if some sub-categories of dancing are afforded diminished protection, how the line between non-obscene

"bumps and grinds" and "Swan Lake" could be drawn.[1/] Nor does it present an opportunity to decide whether a state or municipality, by means of a narrowly drawn ordinance directed at nude dancing or other similar activity, could either regulate a category of protected activity such as "nude dancing" by zoning, or eliminate it altogether under threat of criminal penalties.

[1/] Amici believe that live dancing -- even barroom-type nude dancing -- is presumptively entitled to First Amendment protection, Doran v. Salem Inn., 422 U.S. 922 (1975); California v. LaRue, 409 U.S. 109 (1972); see also Young v. American Mini Theatres, 427 U.S. 310 (1976), and are aware of no test other than that of Miller v. California, 413 U.S. 15 (1972) by which to distinguish dancing entitled to full protection and other dancing. In any event, Mt. Ephraim has not enacted the type of ordinance or made the findings which could even conceivably justify application of the analysis in Young v. American Mini Theatres to petitioner's activity.

Mt. Ephraim has not enacted a narrowly drawn ordinance, like the ordinance at issue in Young v. American Mini Theatres, 427 U.S. 50 (1976), to regulate the places at which "adult entertainment" may take place without significantly restricting access to it or eliminating it altogether. Instead, Mt. Ephraim has enacted a zoning ordinance that completely eliminates from the entire town, on penalty of criminal prosecution, all live entertainment, including (so far as we can tell) the presentation of Hamlet, the reading of poetry, singing of political songs by a folk balladeer, enactment of a play like MacBird, or a chamber music group playing a Mozart Quartet.

The ordinance is overbroad, vague,

and irrational. It prohibits activity protected by the First Amendment without any showing that the proscription is essential to further compelling governmental interests. No court has construed the ordinance so as to give fair warning of various kinds of "live entertainment" -- say, a bridge game at home, or Bingo games in a store after hours, or a barbershop quartet singing in an office for a Christmas party -- that the plain language of the ordinance would forbid. Nor is there any indication in the record of any governmental interest that could rationally justify an ordinance permitting adult bookstores and film-strip peep shows, but forbidding peep-shows with a live dancer behind a glass screen, or more generally permitting filmed but not live entertainment.

Accordinlgy, the judgment of the

court below must be reversed. In the alternative, because that court did not address the substantial First Amendment questions raised by a zoning regulation completely eliminating from a community permitting commercial uses substantial categories of First Amendment protected activity, the judgment below should be vacated and the case remanded for further consideration and development of a fuller record on which to decide the questions raised.

ARGUMENT

I. MT. EPHRAIM'S ABSOLUTE BAN ON ALL "LIVE ENTERTAINMENT IS OVERBROAD IN VIOLATION OF THE FIRST AMENDMENT.

Although in form a zoning ordinance, the New Jersey Courts have construed Ordinance 99-15B as a proscription of all

"live entertainment", punishable by criminal fines, anywhere in the entire municipality. See the Opinion below, Appendix to the Jurisdictional Statement, (hereafter "J.App.") at 4a, 6a, 7a. The ordinance cannot be construed as a reasonable time, place or manner regulation, because it permits live entertainment in Mt. Ephraim at no time, in no place, and in no manner.[2/] See, e.g., Consolidated Edison v. Public Service Commission, 65 L.Ed.2d 319, 327-28; compare Young v. American Mini Theatres, supra, at 62-63 (zoning, but not elimination, of "adult entertainment").

[2/] The prior non-conforming uses grandfathered by the Court below are of no analytical significance in this respect.

Where an ordinance forbids and threatens criminal punishment for activities presumptively protected by the First Amendment, the government can prevail only by showing that the ordinance is narrowly drawn and is no broader than necessary to further a compelling governmental interest. United States v. Robel, 389 U.S. 258 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Consolidated Edison v. Public Service Commission, supra. [3/] Legislation in the First Amendment area must be precisely and

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[3/] Although zoning ordinances ordinarily aim at governmental interests other than the suppression of speech, and would therefore be subject to the somewhat less strict analysis of United States v. O'Brien, 391 U.S. 367 (1968), for regulations applied to mixed speech and "non speech conduct" which have only an "incidental" limitation on First Amendment freedoms, the present ordinance is subject to the stricter test.

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narrowly drawn to minimize "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 433 (1963).

The ordinance applied against Appellants fails to comply with the above principles, and is consequently overbroad

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A zoning ordinance which permits the variety of commercial uses the ordinance permits here, and yet proscribes "live entertainment", does not further "a governmental interest unrelated to the suppression of free expression" under O'Brien. To the contrary, Mt. Ephraim's interest in banning "live entertainment" is directly related to the suppression of free expression. See Young v. American Mini Theatres, 427 U.S. at 81 n.4 (Powell, J., concurring). Nor has Mt. Ephraim properly identified the "non speech elements" of the proscribed dancing which it could justifiably regulate, as did Detroit in Young v. American Mini Theatres. Compare O'Brien at 376.

on its face. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Gooding v. Wilson, 405 U.S. 158 (1972); Village of Schaumberg v. Citizens for a Better Environment, 63 L.Ed.2d 73 (1980). The overbreadth of the ordinance, prohibiting all live entertainment, is both "real and substantial" within the meaning of Broadrick v. Oklahoma, 413 U.S. 601 (1973). Indeed, it is nothing less than extraordinary. The New Jersey Courts have not attempted to limit the ordinance in any way, as for example to entertainment which could be held obscene, see Miller v. California, supra, or to entertainment which poses special aesthetic or social probelms, see Young v. American Mini Theatres, supra. The production of all plays, the reading of all poetry, all dancing, including Swan Lake, all live political satire, and all folk singing are

forbidden, irrespective of political content. All of these activities are entitled to full First Amendment protection. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)(theater); Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495 (1952) (movies); Schact v. United States, 398 U.S. 58 (1970)(political street theater); Doran v. Salem Inn, 422 U.S. 922 (1975)(dancing).[4/]

On this record, Mt. Ephraim has not carried its burden of showing that proscription of all live entertainment is necessary to serve compelling governmental interests. The Court below did not attempt

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[4/] The Court has recently re-emphasized that the First Amendment protects not only political speech but also "self expression". Consolidated Edison v. Public Service Commission, 65 L.Ed.2d 319, 326 n.2 (1980).

to identify any governmental interest to support the distinction between permitted First Amendment uses (motion pictures and filmed performances of dancing, plays, poetry readings, ballet, folksinging, and so forth) and prohibited live performances. 5/ Because the lower court did

5/ In this respect, the case is like Carey v. Brown, 65 L.Ed.2d 263, where the Court noted that any interest which justifies a proscription on political speech must apply a fortiorari to labor speech, and since the community did not so apply it, the interest was held not compelling. 65 L.Ed. 2d at 272-273. Here, any interest that could justify proscription of all live entertainment would necessarily apply to various permitted uses, e.g., peep shows, movies and filmed performances, restaurants, liquor stores, and so forth. Having permitted these, Mt. Ephraim may not claim that the interests supporting its zoning regulations are "compelling" as regards live entertainment.

not even identify such an interest, it did not require Mt. Ephraim to show how the ordinance was necessary to serve such an interest. Any concerns Mt. Ephraim might have had concerning fire codes, the hours its police must manage traffic, and parking and traffic congestion, could have been served by a more narrowly drawn ordinance imposing time, place and manner restrictions, rather than the blunderbuss approach taken here. 6/

6/ This case does not require the Court to decide whether the police power, under which communities have a large measure of discretion to zone, could support a non-vague ordinance restricting some forms of live entertainment from particular areas in a multi-zoned community, or even completely from a wholly residential community (for example, banning the commercial presentation of plays from a residential neighborhood.) Even assuming arguendo that such

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Accordingly, the ordinance is unconstitutionally overbroad.

II. MT. EPHRAIM'S ZONING ORDINANCE IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST AMENDMENT.

Both on its face and as applied, the challenged ordinance is unconstitutionally vague.

The general form of the ordinance -- specifying certain permitted uses, and prohibiting "all uses not expressly permitted" -- plainly does not indicate whether

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a zoning ordinance would be constitutional, this case presents the quite different fact pattern the Court indicated would be plainly unconstitutional in Young v. American Mini Theatres -- the total elimination from a community with commercial zones of material presumptively protected by the First Amendment. See Young, supra, at 70, 72 n.35; id. at 78-79 (Powell, J., concurring).

activities like singing, or dancing, or political theater, may occur in "permitted uses" such as "offices" or "banks" or "bookstores". Although the New Jersey Court has attempted to remedy this problem by explicitly declaring that the ordinance bans all "live entertainment", a construction binding on this Court, that construction does not provide the necessary guidance of what is permitted and proscribed in an area touching First Amendment freedoms. May a permitted restaurant have a strolling accordian player? Or a live musician in a back room whose music is piped into the dining area? May a permitted office invite a barbershop quartet to sing at a Christmas Party? May a permitted bookstore ask a poet to read his poetry, or autograph his books? May a permitted movie theater invite a director to discuss his movie for the audience after a screening,

or invite the star of the movie to appear and greet the audience? Is bridge, or bingo, or Little League baseball "live entertainment"? Is a fund-raising speech by Howard Jarvis, or William Kuntsler? Or Mark Russel's satiric comedy routine? Is singing by Peter, Paul and Mary "live entertainment," even if presented at a fund-raiser for a local political candidate?

The answer to all of these questions is unclear. The First Amendment does not permit a criminal fine to be imposed under a statute which does not provide fair warning of what is, and is not permitted. Vague statutes present an unacceptable risk that individuals will be unclear as to what is permitted and forbidden, and as a result will forego activity that is protected by the First Amendment. See, e.g., Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976);

Smith v. Goguen, 415 U.S. 566, 573 (1974); Smith v. California, 361 U.S. 147, 151 (1959). Whenever greater precision are possible, convictions for protected First Amendment activity under vague statutes is set aside.

Although it is difficult to suggest more precise wording for the ordinance because we are not told what New Jersey's interest is, any conceivable compelling interest could have been served by a far less sweeping and uncertain ordinance. Even if we assume that Mt. Ephraim's interest was the interest in Young v. American Mini Theatres -- a conclusion this record could not support -- the Detroit ordinance is a model of precision compared with the ordinance here. Although the First Amendment might well, on substantive grounds, bar proscription of "nude dancing", at

least such an ordinance would not be impermissibly vague. By contrast, this ordinance provides no clear warning of what is, and is not, punishable by the criminal law.

Although vagueness is usually analyzed by viewing the ordinance on its face, the particular facts of this case emphasize the vagueness of the ordinance and the unfairness of applying it to petitioner.

Although the ordinance did not specifically permit the sale of films of a sexually explicit nature, Appellants had long offered such films to their customers without being cited for non-conforming usage of their property. Moreover, Appellants later applied for, and received, licenses for the operation of several viewing devices for the exhibition of sexually explicit films, known in the colloquial as

"peepshows", again even though the ordinance did not specifically permit this usage. Under the circumstances, Appellants made the quite logical assumption that entertainment of a sexually frank nature did not violate the ordinances. Coupled with this was their realization that local night clubs had been offering live entertainment for years pre-dating the enactment of the ordinance in question.

Only after installation of devices for viewing live nude dancers did Appellee determine that Appellants were in violation of the zoning ordinances. The prior inconsistant actions of borough officials and the vague terms of the ordinance could not logically have put Appellants on notice that the exhibition of filmed nude dancers was so different from the exhibition of live nude dancers that the ordinance would

allow one and criminally punish the other.[7/]

These facts highlight one of the central vices of a vague statute, the unfettered discretion vague statutes provide to officials who execute the laws. Vague statutes are subject to capricious enforcement. As this Court has noted:

> Where...there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.
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> Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

[7/] In this respect, the case is quite different from Young v. American Mini Theatres, supra, where the application of the ordinance to the respondents was clear. See 427 U.S. at 58-61. Moreover, here, but not in Young, the statute is vague not only as to material "on the borderline between pornography and artistic expression" but throughout the range of protected activity. See id.

Armed with a statute which could be as elastic or restrictive as they felt the occasion demanded, borough officials may well have applied the ordinance to achieve an impermissible content-oriented censorship.

Accordingly, the conviction must be reversed because the ordinance is unconstitutionally vague.

III. MT. EPHRAIM'S ZONING ORDINANCE, WHICH PERMITTED PETITIONER TO EXHIBIT FILM-STRIP PEEP SHOWS BUT PROHIBITED LIVE PEEP SHOWS, DOES NOT RATIONALLY AND SUBSTANTIALLY ADVANCE ANY LEGITIMATE GOVERNMENTAL INTEREST, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Although it is clear that municipalities have the authority, through the police power, to enact and enforce zoning ordinances to protect the public health, safety or general welfare, Penn Central Transportation

Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court has held that zoning laws constitute a "taking", and accordingly violate the Fifth Amendment and due process clauses, if they do not "substantially" and rationally advance legitimate state interests. Agins v. City of Tiburon, 65 L.Ed.2d 106, 112 (1980); Nectow v. Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty Co., supra.

The goals for which a community may zone are not narrowly constricted by the Constitution. For example, the Court has upheld zoning regulations which zone out industrial usage to create a purely residential area. Euclid v. Ambler Realty Co., supra. This Court has found that there is a valid state interest served in leaving

areas of land undeveloped, Gorieb v. Fox, 274 U.S. 603 (1927), in limiting the height of buildings within a designated area, Welch v. Swasey, 214 U.S. 91 (1909) and in preserving the aesthetics and character of a given neighborhood. New Orleans v. Dukes, 427 U.S. 297 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). However, the basic requirement of rationality, of substantial relationship to a legitimate state interest, remains. A community must have some legitimate reason to zone as it does, and its zoning must further that interest. Nectow v. Cambridge, supra. Zoning which is irrational -- which permits red houses and forbids brown houses without justification, for example -- violates the due process clause. Similarly, unless some legitimate state interest is rationally advanced by prohibiting "live entertain-

ment", including the live peep show for which petitioners have been punished, while permitting filmed peepshows, the ordinance is unconstitutional.[8/]

There is no rational distinction between the sexually explicit filmed conduct exhibited on Appellants' premises to paying customers permitted by the ordinance and the exhibition, through a viewing glass,

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[8/] So long as the categorical distinctions a statute makes are rational, the due process clause is not necessarily offended because a statute is irrational as applied in a particular case. See generally O'Connor v. Board of Education, 49 U.S.L.W. 3551, 3552 n. 4 (Stevens, Circuit Justice). The point here is not that this ordinance is per se irrational as applied to prohibit live dancing, but that the categorical distinction between live dancing and filmed dancing (or between live entertainment and other entertainment) does not rationally advance any state interest identified in this record.

of live dancers engaging in identical conduct before the same customers. Both forms of entertainment would attract approximately the same volume and character of clientele. Differentiating between one form of entertainment and the other in the context of this case is completely irrational and constitutionally impermissible; it does not substantially advance any state interest.

This is not a case, like California v. LaRue, 409 U.S. 109 (1972) where disruptive and lewd conduct occurred when performers were allowed to come into direct contact with the viewing audience. Here, by contrast, the performers were separated from the viewers by a glass window, eliminating the possibility of such disruptive or lewd behavior. Nor can Mt. Ephraim rely, as did California, on the Twenty-first Amendment to support the distinction it

makes, because Appellants' premises did not have a liquor license.

Any conceivable interest sufficient to regulate the live entertainment offered by Appellants would have applied to film-strip peep shows as well, and to a wide variety of other conduct permitted in Mt. Ephraim's commercial zone. The distinctions made by the Mt. Ephraim ordinance are not sufficiently rational to withstand Appellants' due process challenge.

IV. IN THE ALTERNATIVE, THE COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND THE CASE FOR CONSIDERATION BY THE NEW JERSEY COURTS OF APPELLANTS' FIRST AMENDMENT CLAIMS.

Amici believe that the conviction below violates the First, Fifth, and Fourteenth Amendments, and must be reversed. Inexplicably, the court below did not even

address the merits of the First Amendment claims, concluding without reasoning that "First Amendment guarantees are not involved in this matter." J.App. 8a; see also J.App. 6a and 9a. If this Court does not reverse on the merits, it should at least remand for fuller development of the record and examination by the New Jersey courts of Appellants' First Amendment claims.

The Court below seems to have thought that, by placing this case in a zoning pigeonhole, all First Amendment considerations were rendered irrelevant. Its judgment may have been based on the general rule that communities are free within wide limits to zone in or out particular uses, and that every community need not permit every conceivable use. See, e.g., Belle Terre v. Boraas, supra.

Amici have argued above that, notwithstanding these general principles of the law of zoning, some First Amendment uses such as plays, poetry readings, folk-singing and the like, cannot completely be zoned out of a community, at least where that community permits commercial uses. Compare Hague v. CIO, 307 U.S. 496 (1939). But even if we are wrong, it can hardly be doubted that if an entire state, or a large city, or every community in a county or region, zoned out such First Amendment activity, the First Amendment would be violated.[9/]

[9/] Even as to non-obscene erotic materials, the Court has held that the First Amendment does not tolerate "suppression" or significant "restrictions" on access, Young v. American Mini Theatres, supra, at 70, 72 n.35; id., at 78-79 (Powell, J., concurring). Elimination of all "live entertainment" would a fortiorari be unconstitutional.

At what point an otherwise permissible zoning scheme's prohibition of live entertainment or other First Amendment uses would become unconstitutional is not an easy question to answer. The present record does not even begin to afford an appropriate basis for exploring the relevant considerations. Accordingly, if the Court does not reverse the judgment below for any of the three reasons we have urged, it should vacate and remand for development of a mere complete record and for consideration by the New Jersey courts of the important First Amendment questions raised.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. Alternatively, the Court should vacate the judgment and remand the case for further consideration consistent with the Court's opinion.

Respectfully submitted,

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